

by the commissioner until the term had closed, and the papers were with the Chancellor for his decision. Under such circumstances, I cannot bring myself to think it would be compatible with justice, the practice of the court, or the analogies to be derived from proceedings at common law, to allow the witness to take back or explain proof which he had given nearly two years before, and which had been in court, and subject to the inspection of all parties, for upwards of eight months. No sufficient excuse, in my opinion, is given for this great negligence, and I am not disposed, in the absence of such excuse, to sanction a practice from which so much inconvenience might be fairly apprehended. The petition, therefore, will be dismissed, and the only question then arises upon the exceptions to the last report of the Auditor.

The sixth exception of the defendants to the report filed on the 21st of July last, and in their exceptions to the testimony filed on the 30th of the same month, the testimony of the said Edward Tolson is excepted to upon the ground that the previous order of the court for his examination had not been obtained, and in the paper last filed, it is said that none of the parties except the witness himself had notice of his examination, or opportunity of cross-examination.

But this statement, that the defendants had no notice of his examination, if it refers to the time and place of his examination, is contradicted by the return of the commissioner, which states expressly that the meeting at Bladensburg on the 19th of September, 1851, when he was examined on the complainant's interrogatories was, "pursuant to previous notice thereof given to the parties." The defendants, therefore, had notice that on that day, and at that place, the complainants would proceed to take proof, under a commission issued by consent of parties, and it was their own negligence if they did not attend. It is true they were not specially notified that Edward Tolson would be examined, but they knew that proof would be taken, and might and ought to have been present. Nor can it be said they have been deprived of the privilege of cross-examining the witness, for it cannot be doubted that if application had